

U.S. Department of Labor

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Issue Date: 12 April 2004

In the Matter of:

RUDRANATH TALUKDAR and
HARJINDER K. VIRDEE,
Prosecuting Parties

Case No. 2002-LCA-25

v.

U. S. DEPARTMENT OF VETERANS
AFFAIRS MEDICAL & REGIONAL
OFFICE CENTER, FARGO, ND,
Respondent

Appearances:

Rudranath Talukdar
Pro Se Prosecuting Party

Harjinder Virdee
Pro Se Prosecuting Party

Alan Duppler, Esq.
Office of Regional Counsel
Department of Veterans Affairs
Fargo, North Dakota
Counsel for Respondent

Before: Alice M. Craft
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim of whistleblower protection under the employee protection provision of Section 212(n) of the Immigration and Nationality Act of 1952, as amended ("INA" or "the Act"), 8 U.S.C. § 1182(n)(2)(C)(iv), and the implementing regulations found at 20 CFR Part 655 Subpart I (2003). In this case, the Prosecuting Parties, Dr. Rudranath Talukdar and Dr. Harjinder Virdee, allege that they were terminated from their positions as physicians for the Respondent, the Department of Veterans Affairs Medical & Regional Office Center of Fargo, North Dakota ("VAMC") because they cooperated with an investigation of VAMC by the Department of Labor.

STATEMENT OF THE CASE

Under the INA, an employer may hire non-immigrant alien workers from “specialty occupations” to work in the United States for prescribed periods of time. 8 U.S.C. § 1101(a)(15)(H)(i)(b); 20 CFR § 655.700. These workers are issued H-1B visas by the Department of State upon approval by the United States Citizenship and Immigration Services.¹ 20 CFR § 655.705(b). An employer seeking to hire an alien in a specialty occupation on an H-1B visa must obtain certification from the U.S. Department of Labor (“DOL”) by filing a Labor Condition Application (“LCA”) before the worker is given an H-1B visa. 8 U.S.C. § 1182(n). An LCA filed by an employer must set forth, *inter alia*, the wage rate and working conditions for the H-1B employee. 8 U.S.C. § 1182(n)(1)(D); 20 CFR §§ 655.731 and 655.732. The wage rate must be the actual wage level paid by the employer to other employees with similar experience and qualifications, or the prevailing wage level for the position in the area, whichever is greater, 8 U.S.C. § 1182(n)(1)(A), in order to “protect U.S. workers’ wages and eliminate any economic incentive or advantage in hiring temporary foreign workers.” 65 Fed. Reg. 80110 (2000). The DOL is responsible for investigating complaints that an employer has failed to comply with the terms of the LCA, or has failed to pay the appropriate wage rate. 8 U.S.C. § 1182(n)(2). Subsection (n)(2)(C)(iv) provides that it is a violation of the Act for an employer to discriminate against an employee who discloses information about or cooperates with an investigation of a violation of the Act’s requirements.

Dr. Talukdar and Dr. Virdee both served as physicians at VAMC. They contend that they were fired because they provided information to an investigator for the Department of Labor who performed an audit of VAMC’s H-1B visa program in January 2001. VAMC denies retaliating against Drs. Talukdar and Virdee for their involvement in the audit, and contends that they were terminated because of budget restraints at VAMC.

PROCEDURAL HISTORY

On June 3, 2002, Robert E. Redding, President of Local 225 of the National Federation of Federal Employees (“NFFE”), filed a complaint on behalf of Drs. Talukdar and Virdee with the U.S. Department of Labor’s Employment Standards Administration, Wage and Hour Division (“Wage and Hour Division”). Mr. Redding alleged that the two doctors were being terminated from their positions at VAMC because of their “recent testimony and cooperation with the [DOL’s] investigation of pay inequities at the Fargo VA [which] resulted in a decision in favor of minority doctors in excess of \$200,000.00.” In addition to termination, Mr. Redding alleged other negative action against the two doctors, including “verbal assaults, reassignment of duties, physical assaults on Dr. Virdee by a white manager, refusal to pay additional wages to Dr. Talukdar ... refusal to permit the use of official time for work on additional cases relative to pay, intimidation, etc.”²

¹ Formerly, the Immigration and Naturalization Service.

² The complaint referred to both Prosecuting Parties as minority employees, and alleged whistleblower activity involving the Office of Special Counsel, the Equal Opportunity

On July 25, 2002, the District Director for the Wage and Hour Division issued his determination on the complaint. The District Director stated that based on the evidence obtained in the investigation, he found no violation of the H-1B provisions of the INA. The determination stated that the parties had 15 days from the date of the determination to file a request for a hearing. The copy of the determination served on the Chief Administrative Law Judge was sent by certified mail, post-marked August 5, 2002, and stamped as having been received by the Office of Administrative Law Judges (“OALJ”) on August 8, 2002.

On August 27, 2002, the Chief Administrative Law Judge received written requests for a hearing from the Prosecuting Parties. Both were post-marked August 23, 2002, and the Prosecuting Parties represented that their copies of the determination had been delivered by certified mail on August 12, 2002. On September 4, 2002, OALJ also received an appeal from Mr. Redding, dated August 12, 2002, post-marked August 29, 2002.

Also on September 4, 2002, the case was assigned to me for hearing and disposition. On September 12, 2002, I issued a Notice of Hearing and Prehearing Order, setting a hearing to be held on October 15, 2002. In the prehearing order, based on a theory of equitable tolling, I made a preliminary determination that the Prosecuting Parties’ requests for hearing were timely filed, but that Mr. Redding’s appeal was not timely filed. I ordered the NFFE to file a motion to intervene as a party or to participate as *amicus curiae*, should it still wish to be involved in the case. Finally, I ordered the parties to submit prehearing submissions on or before October 4, 2002. VAMC did not contest the timeliness of the Prosecuting Parties’ appeals of the District Director’s determination during subsequent proceedings. Transcript volume I (“Tr. I”) at 5.

On October 1, 2002, counsel for Respondent filed a letter in response to my Prehearing Order of September 12, 2002. In his letter, Counsel for VAMC stated that the issue to be decided is whether Respondent discriminated against Prosecuting Parties because of their participation in the H-1B audit. He stated that the audit was conducted in January 2001, after which the Wage and Hour Division held that VAMC was not in compliance with DOL’s regulations in several respects, including failure to pay the prevailing wage to its H-1B visa holders. Counsel for VAMC noted that this determination had been appealed.³ He stated that

Employment Commission and the Department of Veterans Affairs Central Office, as well as the Department of Labor.

³ Review of LCA cases posted on the OALJ web-site at <http://www.oalj.dol.gov> discloses two decisions related to this case, of which I take official notice pursuant to 29 CFR § 18.45: *Fargo VA Medical Center v. Employment and Training Administration*, ALJ No. 2001-LCA-31 (HTML and PDF) (ALJ Jan. 23, 2002) (appeal of a wage determination, holding that the Employment and Training Administration correctly calculated the prevailing wage for a cardiologist when requested to do so by the Wage and Hour Division as part of its investigation); and *Administrator, Wage and Hour Division, U.S. Department of Labor v. Fargo VA Medical Center*, ALJ No. 2002-LCA-13 (HTML) (ALJ March 27, 2003) (appeal of the Administrator’s March 20, 2002, determination that the Respondent had failed to pay the applicable prevailing wage to H-1B doctors, holding that the Respondent is an employer subject to the H-1B

subsequent to the H-1B audit, Prosecuting Parties were terminated by Respondent due to a lack of funding for their positions.⁴

On October 4, 2002, Dr. Virdee filed a letter in response to my Prehearing Order of September 12, 2002. In her letter, she stated that the issue to be decided is whether she and Dr. Talukdar had been discriminated against for assisting DOL in its investigation of the H-1B issue. She raised both her termination, and a negative proficiency report issued after her termination, as discriminatory actions. She stated that Dr. Talukdar was in travel status due to loss of his job, and was expected to contact Mr. Redding “any day.” Neither Dr. Talukdar nor Mr. Redding filed any response to the Prehearing Order.

October 15, 2002, I conducted a hearing in Fargo, North Dakota. Dr. Virdee, Mr. Redding, and David Kirk, VAMC’s Human Resources Officer, testified at the hearing. Dr. Talukdar did not appear at the hearing. Complainant’s Exhibits (“CX”) 1-11, Tr. I at 23-32, CX 13, Tr. I at 129, Agency’s Exhibits (“AX”) 1-4, Tr. I at 137-146, and a Joint Exhibit (“JX”) 1, Tr. I at 126-127, were admitted into evidence. CX 12, a January 2001 study of physician pay, was excluded from evidence. Tr. I at 114-115; *see also* Tr. II at 247-249.

On October 18, 2002, I issued an order requiring Dr. Talukdar to show cause within 30 days why his request for hearing should not be dismissed. On November 2, 2002, Dr. Talukdar filed a letter in response to my order stating that he could not attend the hearing because he was in the process of moving to Houston Texas where he had just joined a fellowship program and was unable to leave at short notice. An e-mail he sent to Dr. Virdee explaining his absence had not been received in time to deliver to the court. Counsel for VAMC filed a reply on November 25, 2002, contending that Dr. Talukdar’s complaint should be dismissed or a ruling should be entered based on the evidence already in the record. On December 19, 2002, I issued a ruling determining that Dr. Talukdar had shown good cause why he was unable to appear at the hearing. I held a telephone conference to discuss how the case should proceed on January 14, 2003, and on January 15, 2003, I issued an order setting a supplemental hearing for March 4, 2003. During the telephone conference, I also admitted CX 14, submitted by Dr. Virdee on November 5, 2002, over the objection of VAMC made by letter from counsel dated December 4, 2002. Transcript of telephone conference at 9-10.

regulations, and ordering it to pay back wages to ten physicians in the amount, stipulated to by the parties, of \$212,499.14.).

⁴ In his October 1, 2002, letter, counsel for VAMC also mentioned that both Prosecuting Parties are foreign citizens, but permanent residents of the United States rather than H-1B visa-holders. In a letter dated October 25, 2002, counsel for the Wage and Hour Division submitted a letter taking no position on the merits of the claim, but expressing the position that “[t]he anti-discrimination provisions of the [INA] protect all employees (including former employees and applicants), regardless of immigration or citizenship status.” The VAMC did not argue that the Prosecuting Parties’ immigration or citizenship status affected whether they are protected by the Act during these proceedings.

The supplemental hearing proceeded as scheduled on March 4 and 5, 2003, *see* transcripts, volumes II and III (“Tr. II” and “Tr. III”) at which time I confirmed admission of three pages of CX 14 (Tr. II at 216-221) and admitted CX 15-21 (Tr. III at 532, 535, 536, 554, 561, 562, 574), CX 31-34 (Tr. II at 232-235), CX 38-41 (Tr. II at 251, 259-261, 272, 287) and CX 43-45 (Tr. III at 406, 457, 587). CX 35 and 36 (Tr. II at 242), 37 (Tr. II at 245), and 42 (Tr. II at 373) were excluded. Dr. Talukdar, Dr. Babu Elabasar, a doctor formerly employed at VAMC, Mr. Redding, Dr. Virdee, Dr. Robert Cooper, who is Dr. Virdee’s husband and was and is currently employed at VAMC, Mr. Kirk, the Human Resources Officer, and Douglas Kenyon, VAMC’s Director, testified during the supplemental hearing. At the close of the supplemental hearing, the record was held open until April 18, 2003, to allow Prosecuting Parties to submit additional exhibits. Dr. Virdee later submitted CX 22 and 23, to which Respondent did not object. By Order dated May 9, 2001, I granted an extension to Dr. Talukdar to allow him to submit additional e-mail exhibits; however, due to technical difficulties, the e-mails were never submitted.

On July 2, 2003, I issued an Order admitting CX 22 and 23, closing the record, and allowing the parties 30 days to submit closing statements. Drs. Talukdar and Virdee submitted closing statements by August 1, 2003. Counsel for VAMC advised that he would not be submitting a closing statement. The record is now closed.

In reaching my decision, I have reviewed and considered the entire record, including all exhibits admitted into evidence, the testimony at the hearings, and the arguments of the parties.

ISSUE

Whether VAMC retaliated against Drs. Talukdar and Virdee, in violation of 8 U.S.C. § 1182(n)(2)(C)(iv), by terminating them because of their participation in the H-1B audit of VAMC.

APPLICABLE STANDARDS

Pertinent to this claim, the INA provides:

(iv) it is a violation of this clause for an employer who filed an application under this subsection to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against an employee (which term, for purposes of this clause, includes a former employee and an applicant for employment) *because the employee has disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of this subsection, or any rule or regulation pertaining to this subsection, or because the employee cooperates or seeks to cooperate in an investigation or other proceeding concerning the employer’s compliance with the requirements of this subsection or any rule or regulation pertaining to this subsection.*

8 U.S.C. § 1182(n)(2)(C)(iv)(emphasis added). The regulations echo that language. 20 CFR § 655.801(a)(2003). As the language and intent of this provision are similar to the employee protection provisions contained in the nuclear and environmental whistleblower statutes

administered by DOL, the same analysis applies. 65 Fed. Reg. 80178 (2000) (“The Department is of the view that Congress intended that the Department, in interpreting and applying this provision, should be guided by the well-developed principles that have arisen under the various whistleblower protection statutes that have been administered by this Department (see 29 CFR Part 24).”); see *Administrator v. IHS Inc.*, USDOL/OALJ Reporter (HTML), ALJ No. 93-ARN-1 at 74 (ALJ Mar. 18, 1996).

In order to prevail on their claims, Drs. Talukdar and Virdee must establish by a preponderance of the evidence that VAMC took adverse employment action against them because they engaged in protected activity. *Carroll v. U.S. Dep't of Labor*, 78 F.3d 352, 356 (8th Cir. 1996); *Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 277-278 (7th Cir. 1995). Whistleblower cases are analyzed under the framework of precedent developed in retaliation cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. and other anti-discrimination statutes. See *Overall v. Tennessee Valley Authority*, USDOL/OALJ Reporter (HTML), ARB Nos.1998-111, 128, ALJ No. 1997-ERA-53, at 12-13 (ARB Apr. 30, 2001), citing, inter alia, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Center v. Hicks*, 450 U.S. 502 (1993); and *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (2000). Where there is direct evidence of discrimination, then the complainant prevails unless the respondent can establish an affirmative defense. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 997 (2002) (Title VII case); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121-122 (1985) (Age Discrimination in Employment Act (“ADEA”) case). In this case, the Prosecuting Parties have introduced no direct evidence of discrimination.

When direct evidence of discrimination is not available, prosecuting parties first must create an inference of unlawful discrimination by establishing a prima facie case of discrimination, by showing that the respondent is subject to the Act; that the prosecuting parties engaged in protected activity; that they suffered adverse employment action; and that a nexus exists between the protected activity and adverse action. The prosecuting parties must show that the respondent had knowledge of the protected activity to establish a prima facie case. See *Bartlik v. U.S. Dept. of Labor*, 73 F.3d 100, 102, 103 n. 6 (6th Cir. 1996); *Carroll v. U.S. Dept. of Labor*, 78 F.3d 352, 356 (8th Cir. 1995); *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982); 29 CFR § 24.5(a)(2). The burden then shifts to the respondent to produce evidence that it took adverse action for a legitimate, nondiscriminatory reason. Under the traditional Title VII analysis, the burden of persuasion remains at all times with the prosecuting parties, who must prove by a preponderance of the evidence that the respondent's proffered reasons were not the true reasons and constitute a pretext for discrimination. *Burdine*, 450 U.S. at 253.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. SUMMARY OF THE EVIDENCE

VAMC provides medical care to veterans of the armed forces in Fargo, North Dakota. It is part of an “Integrated Service Network” of medical facilities operated by the U.S. Department of Veterans Affairs in several Midwestern states (North Dakota, South Dakota, Minnesota and Nebraska, and possibly others). Tr. I at 103, 147, Tr. II at 198. Dr. Robert Petzel, the network

Director, is located in Minneapolis, Minnesota. In addition to the Medical Center in Fargo, VAMC is also responsible for administering several community-based outpatient clinics, including one in Grand Forks and one in Bismarck. Tr. II at 199. Douglas Kenyon has been the Center Director of VAMC since 1992. Tr. III at 465. The Center Director is responsible for the overall operation of the facility, the administration, the budget, day-to-day operations and communications with stake-holders. Tr. III at 467. David Kirk is the Chief Human Resources Officer, and has been at VAMC since 1995, Tr. I at 153. He does not make or participate in personnel decisions; it is his role to process them. Tr. I at 170. He is also the designated representative of VAMC in union negotiations. Tr. III at 567-568. The Chief of Staff/Medical Director is Dr. Ned B. Nichols. Dr. Talukdar's specialty is internal medicine, while Dr. Virdee's is psychiatry. During 2001 and 2002, when the central events in this case took place, both reported to Dr. Ronald Johnson, as head of primary care, who in turn reported to Dr. Nichols. The chief of psychiatry, also reporting to Dr. Nichols, was Dr. Ada Kirkman.

Physicians at VAMC are represented by a union, Local 225 of the NFFE. Mr. Robert Redding has been the president of the union local since 1998.⁵ Tr. I at 105; Tr. II at 358. Dr. Talukdar and Dr. Virdee both served as union representatives for the physicians in the union. Dr. Virdee initially spent her own time to do union business. Around June 2001, she began spending fifty percent of her official time on union duties. She was chief steward, but eventually became a vice president and began working full-time on union activities beginning in February 2002. Tr. I at 13, 65, 117, 120. Dr. Talukdar was a vice president when Dr. Virdee was chief steward. Tr. I at 120, Tr. II at 270, 294. He spent approximately five percent of his official time on union duties because his patient load would not permit him to do otherwise. Tr. II at 270. With respect to the H-1B issue, Drs. Talukdar and Virdee worked extensively with Mr. Redding. Tr. I at 12, 93, Tr. II at 237, 358. They also worked together on collective bargaining sessions. Tr. I at 98.

Dr. Virdee has been practicing psychiatry since 1982. Tr. I at 49; Tr. III at 392-394. She is board-certified in psychiatry and neurology. Tr. III at 399. She first became involved with VAMC as a psychiatry resident because she was board certified in Canada, but required a year of

⁵ Mr. Redding has also been involved in a dispute with VAMC. By letter dated November 15, 2002, Mr. Redding notified me that he had been banned from accessing his office, mail and records at the Medical Center. During the telephone conference on January 14, 2003, Mr. Redding stated his key had been returned to him at the end of December, after which he had access to the union office. At the supplemental hearing, he testified that he had been charged with improper use of a computer and given a notice of proposed removal. He believed the action was taken to intimidate him for his participation in this and other H-1B proceedings. Tr. II at 365-366, 371. By letter dated July 30, 2003, he notified me that he had been returned to his employment, alleged that management officials were "less than honest" in his own case before the Merit Systems Protection Board, and offered correspondence from Mr. Kenyon which Mr. Redding contended contradicted his testimony regarding e-mail, suggesting that VAMC management officials should be sanctioned for perjury regarding the availability and storage of e-mail. As Mr. Redding's case is not before me, and the facts have not been developed in the record with an opportunity for VAMC to respond, I have not taken these allegations into account in my decision in this case.

residency to become board certified in the United States. Tr. III at 397; CX 10. Her residency lasted from June 5, 1996 to February 3, 1997. Due to her outstanding performance as a resident, she was appointed as a full-time staff psychiatrist on August 11, 1997. CX 10. At the time of her appointment, her salary was set at \$85,072 in base pay. AX 1. Some physicians employed by the VA receive “special pay” for being in a “scarce specialty.” See AX 1; AX 2; CX 41; Tr. II at 285; Tr. III at 469; 38 U.S.C. § 7431.⁶ I cannot determine whether Dr. Virdee received special pay when she began her full-time appointment, as the second page of her SF 50 was omitted from the exhibit, AX 1. Her position was funded as temporary insofar as her SF-50 stated that her appointment was not to exceed (“NTE”) August 10, 2000. Tr. I at 137; AX 1. Dr. Virdee’s SF-50 also indicated that the reason for her temporary appointment was her non-citizenship status. AX 1. In addition to the SF-50, Dr. Virdee signed a temporary appointment notice, which stated that she understood her appointment was not to exceed August 11, 1997, and that her position could be terminated at any time prior to this date. The temporary appointment notice also stated that no promise was made or implied that the position would become permanent. AX 3.

In June 1998, Dr. Virdee received her first proficiency report from the outgoing chief of the psychiatry service, Dr. Dean Krain, and was appointed as acting chief to replace him. The report, which rated her performance from August 11, 1997 to August 11, 1998, contained only positive ratings and comments. She received four “outstanding” marks, the highest rating, and one “high satisfactory” mark, the second highest rating, in research and development.⁷ The overall rating was “outstanding.” The written comments stated that Dr. Virdee had done an excellent job with caring for veterans. The comments also noted that she had done an excellent job with medical student education. Her recent promotion to acting chief was also mentioned in a favorable light in her proficiency report. Dr. Nichols signed the report as the approving official and stated in the comments, “Concur with outstanding.” CX 1 (emphasis in original). In her new capacity as acting chief, she reported directly to Dr. Nichols. Tr. I at 50-51, 54.

As VAMC was short of doctors specializing in psychiatry, the job of acting chief was extremely demanding. CX 10; Tr. I at 39; Tr. III at 510-511. In February 1999, Dr. Virdee resigned as chief of the psychiatry service because of the extreme time pressure and lack of necessary support staff. She continued working as a staff physician in psychiatry, however. Tr. I at 52-53; see also Tr. III at 505-506. She also continued to report to Dr. Nichols until July 1999. Tr. I at 55.

⁶ 38 U.S.C. § 7431(a) provides in part: “In order to recruit and retain highly qualified physicians and dentists in the Veterans Health Administration, the Secretary shall provide special pay under this subchapter. ...”

⁷ Proficiency reports for both Prosecuting Parties contain five possible rating categories: clinical competence, educational competence, research and development, administrative competence, and personal qualities. There are also five possible ratings for each individual category, and an overall rating, of “outstanding,” “high satisfactory,” “satisfactory,” “low satisfactory,” or “unsatisfactory.”

On July 2, 1999, Dr. Virdee received her second proficiency report, which was prepared by Dr. Nichols. The report, which rated her performance from August 11, 1998 to August 11, 1999, contained “outstanding” marks in all job performance categories that were applicable to her position, and overall. The written comments described Dr. Virdee as an outstanding clinician and teacher. The comments also noted that, “although she asked to be relieved of the administrative duties of service chief, she continues to provide advice and administrative help whenever asked.” CX 2.

Also in July 1999, Dr. Ada Kirkman assumed Dr. Virdee’s former role as chief of the psychiatry service. Tr. I at 52-53. Relations between Drs. Virdee and Kirkman were unfavorable almost from the outset. Tr. III at 409, 433, 435. In September 1999, Dr. Virdee’s duties changed. She began to perform examinations of veterans to determine their eligibility for disability compensation and pensions. See CX 15. In this capacity, Dr. Virdee reported to Dr. Johnson, head of primary care. Tr. I at 53. According to Mr. Kenyon, this change of assignment came about because Dr. Virdee had indicated she and Dr. Kirkman had differences over patient care, and Dr. Johnson thought she could make a valuable contribution in the compensation and pension evaluations. Tr. III at 512-516. Dr. Kirkman remained hostile to Dr. Virdee throughout the rest of her employment at VAMC. See Dr. Elabasar’s testimony, Tr. II at 353-355, and the discussion below of the April 2001 incident between Dr. Kirkman and Dr. Virdee.

Dr. Talukdar finished medical school in India in 1987, after which he worked as a doctor for the government of India until 1991. He came to the United States, where he completed his residency in internal medicine in 1997. He then entered into private practice, until he went to work for the VA in Fargo. Tr. II at 226. He is board-certified in internal medicine. Tr. II at 227. Dr. Talukdar was appointed to serve as a primary care physician at VAMC on April 29, 1999. Tr. I at 141. He was retained as a temporary appointee insofar as his Standard Form 50 (“SF-50”), his government employment form, stated that his appointment was not to exceed (“NTE”) April 28, 2002. Tr. I at 141; AX 2. Dr. Talukdar’s SF-50 also indicated that the reason for his temporary appointment was his non-citizenship status.⁸ AX 2. His initial pay was set at \$82,249, plus \$32,000 for special pay. In addition to the SF-50, Dr. Talukdar signed a temporary appointment notice, which stated that he understood his appointment was not to exceed April 4, 2000, and that his position could be terminated at any time prior to this date. The temporary appointment notice also noted that no promise was made or implied that the position would become permanent. AX 4. Initially, Dr. Talukdar worked as part of the nighttime/weekend staff. Tr. II at 231.

While at VAMC, Dr. Talukdar’s professional performance was evaluated formally in three proficiency reports. In the first proficiency report, which rated his performance from April 29, 1999 to April 29, 2000, he received a rating of “high satisfactory,” the second highest rating, in clinical competence and personal qualities, the only performance categories that were

⁸ When Dr. Talukdar first arrived at VAMC, he was part of the H-1B program. Tr. II at 231-32. His status changed, however, on November 22, 2000, when he became a permanent resident. Tr. II at 227.

applicable to his position.⁹ The overall evaluation was “high satisfactory.” The written comments stated that Dr. Talukdar had been a valuable addition to the staff, who exhibited good clinical skills in handling emergencies and in diagnosis and patient management. The written comments also characterized him as dependable and noted that he had good relationships with the nursing staff and with his fellow physicians. CX 31. To illustrate that his work was highly thought of, Dr. Talukdar also introduced a very positive letter of recommendation in support of his application for an oncology fellowship written by Dr. Johnson on October 30, 2000. Tr. II at 234; CX 34.

In March 2000, some controversy arose regarding Dr. Virdee’s compensation and pension examinations. Veterans who were displeased with their evaluations sent letters to VAMC and the North Dakota congressional delegation expressing their concerns. Mr. Kenyon, the Center Director, and Dr. Petzel, the Network Director, responded to the veterans with apologetic letters, explaining that Dr. Virdee was new to the compensation and pension process and had made errors. CX 16; CX 17. Meanwhile, Dr. Virdee took issue with this characterization and requested that she be provided with evidence of the errors she made in her evaluations. Tr. I at 57-59, 130-133. Ultimately, it seems that there was never any resolution regarding this issue. *See* CX 17 at 3. Dr. Virdee testified that when management refused to correct what she believed were false statements made about her in the letters, she began filing EEO complaints. Tr. I at 59; Tr. III at 537-547.

The record is unclear when Dr. Virdee first became involved in assisting the H-1B doctors at VAMC. Dr. Virdee testified that she was first approached by Dr. Akinwande, who came from Africa, about differences in pay between him and another cardiologist. Tr. I at 10, 90. She and Mr. Redding came to the conclusion that people of color were being paid differently than Caucasians. Tr. I at 11. When information came to her about differences in the doctors’ pay, she felt the H-1B doctors were in a compromised position because of their status, but that she was not vulnerable because she was a permanent resident of the United States. Tr. I at 34. Mr. Redding thought they started working on the issue in late 1999 or 2000. Tr. II at 358. Dr. Talukdar testified that he started to work with Dr. Virdee and Mr. Redding to try and correct the discrepancies in pay among physicians about the time he moved from night to day staff, joining the Blue Primary Care Team, in May of 2000. Tr. II at 231-232, 237.

Notwithstanding the March 2000 controversy, Dr. Virdee received a third positive proficiency report on May 18, 2000. It was prepared by Dr. Johnson and rated her performance from August 11, 1999 to August 11, 2000. In the report, Dr. Virdee received two “outstanding” marks (clinical competence and personal qualities) and one “high satisfactory” mark (administrative competence). Again the overall rating was “outstanding.” The written comments described Dr. Virdee as a valuable member of the Primary Care staff and noted that she administered excellent compensation and pension examinations and reviews. Dr. Nichols signed the report as the approving official. CX 3.

⁹ The second page of the ratings, containing the signature of the rating official, and space for comments and signature by the approving official, are missing from the copies of Dr. Talukdar’s proficiency reports introduced into evidence. Dr. Talukdar testified to the effect that Dr. Johnson was the rating official. Tr. II at 234.

Also on August 11, 2000, Dr. Virdee's appointment was extended with a new "not to exceed" date of August 10, 2003. Her base pay was set at \$95,723, with special pay of \$59,500. AX 1. As was customary, according to Mr. Kirk, another temporary appointment acknowledgment form was not obtained from Dr. Virdee. Tr. I at 145. On October 27, 2000, Dr. Nichols drafted a glowing recommendation letter as part of Dr. Virdee's application for a leadership program at VAMC. CX 10.

In January 2001, Dr. Virdee assisted Mr. Redding in preparing a study of physician pay that was eventually given to the Wage and Hour Division. Dr. Talukdar also helped gather information from the primary care doctors, and referred Mr. Redding to a statistician to assist with the analysis. Tr. I at 12, 37-38, 59-60, 93; Tr. II at 358. Mr. Redding gave the report to Dr. Nichols, Tr. II at 363, and later to Dr. Petzel, and others. Tr. II at 361. Although Mr. Kenyon testified he never received a copy of the study, Tr. III at 486-490, which Mr. Redding confirmed, Tr. III at 594, Mr. Redding testified that he met with Mr. Kenyon to discuss the issue of physician pay on several occasions between the time the study was issued and April 2002. Tr. III at 591. Mr. Redding contacted the Wage and Hour Division at the request of Dr. Akinwande, which began its audit of the H-1B program at VAMC in the spring of 2001. Tr. I at 94; Tr. III at 590-591. The investigation took almost a year because the issue of the prevailing wage had to be addressed by the OALJ. Tr. I at 94; *see Fargo VA Medical Center v. Employment and Training Administration*, ALJ No. 2001-LCA-31 (HTML and PDF) (ALJ Jan. 23, 2002). Dr. Talukdar testified that he and Dr. Virdee worked openly on the H-1B case. The investigator from the Wage and Hour Division interviewed them right in front of Mr. Kirk's office. Tr. II at 223. Dr. Talukdar encouraged primary care physicians to testify to the Department of Labor. Tr. II at 237. He also spoke to Dr. Johnson several times about the issue. Tr. II at 238, 253-54.

Dr. Talukdar's second proficiency report, which rated his performance from April 29, 2000 to April 29, 2001, contained only favorable ratings and comments. He received a rating of "outstanding," the highest rating, in both performance categories that were applicable to his position, and in his overall evaluation. The written comments stated that he had become more active in the management of the Blue Primary Care Team and that he was an excellent clinician. The written comments also stated that through his active support and adoption of Advanced Clinical Access principles, he was proving his worth in program development. Finally, Dr. Talukdar was described as "a pleasure to work with" and "much appreciated." CX 32.

In April 2001, an incident took place between Drs. Virdee and Kirkman when Dr. Virdee attempted to attend a meeting regarding an H-1B physician who was threatened with termination for alleged errors in patient care. (In the end, he was allowed to resign.) Tr. I at 78, 96; Tr. II at 295-296; Tr. III at 409-412, 547-549. There is substantial disagreement about the severity of the incident. Dr. Virdee testified, and other witnesses corroborated, that Dr. Kirkman was trying to keep Dr. Virdee out of the meeting, and pushed the door into Dr. Virdee as she attempted to enter the room. Tr. I at 42, 63-64, 95-96; Tr. II at 348; Tr. III at 411. Dr. Virdee reported the incident to the Inspector General as an assault, Tr. I at 80-81, and it was investigated by the VA police. Tr. I at 81; Tr. III at 421-422. VAMC argues that the incident was not serious insofar as no assault prevention team was called, the police report stated that the situation may have been over-inflated, and Dr. Virdee felt safe enough to remain in the room with Dr. Kirkman after the

incident. Tr. I at 80-81, 83; Tr. III at 552, 555-557. Notably, however, even Mr. Kirk, the Human Resources Officer who testified for VAMC, admitted on cross-examination that had he been in Dr. Virdee's situation, he would not have wanted to work with Dr. Kirkman after such an incident. Tr. I at 159.

On June 27, 2001, Dr. Virdee received her fourth proficiency report, prepared by Dr. Johnson, rating her performance from August 11, 2000 to August 11, 2001. She received one "outstanding" mark (clinical competence), one "satisfactory" mark (administrative competence), and one "high satisfactory" mark (personal qualities). The overall rating was "high satisfactory." The written comments stated that Dr. Virdee did an excellent job with compensation and pension examinations and included the following statement: "I hope that in the future she will take a more active role in the process improvement activities related to C&P [compensation and pension] as there are changes coming in the near future." Dr. Nichols signed as the approving official. CX 4.

Also in June 2001, Dr. Johnson promoted Dr. Talukdar to be leader of the Blue Primary Care Team.¹⁰ Tr. II at 236, 250. In this capacity, Dr. Talukdar reported directly to Dr. Johnson. Tr. II at 237. On September 6, 2001, Dr. Johnson wrote a memorandum to Dr. Nichols, recommending that Dr. Talukdar be afforded a two-step pay increase due to his promotion as leader of the Blue Primary Care Team. CX 38. Although Dr. Nichols approved of the two step increase in the memorandum, Dr. Talukdar's pay ultimately increased by only one step. CX 38; Tr. II at 252. Even the one-step increase took nine or ten months to materialize, and Dr. Talukdar never received an explanation as to why he did not receive a two-step increase. Tr. II at 252-53.

On September 21, 2001, Dr. Talukdar accepted the position of vice president of the NFFE Union, Local 225. Tr. II at 270. At around this time, Dr. Talukdar also became heavily involved in H-1B advocacy. In October 2001, Dr. Talukdar had a conversation with Dr. Nichols during which Dr. Talukdar voiced his concerns about the H-1B issue. Tr. II at 254.

At an October 2001 staff meeting, Dr. Nichols had proposed that mid-level staff, who were not physicians, be given voting rights at medical staff meetings. The by-laws were silent on that issue. Tr. II at 315-319. In December 2001, Dr. Virdee, Dr. Talukdar, and Dr. Robert Cooper (another physician at VAMC who is also Dr. Virdee's husband) were asked to revise the medical bylaws. Tr. II at 319. The bylaws needed revision to be in accordance with the Joint Commission of Accreditation of Healthcare Organizations and the Veterans Health Administration. The process was delayed by Dr. Talukdar's visit to India in January 2002. Revising the bylaws was an onerous task. Tr. II at 298-299. These revisions ultimately became the source of great controversy at medical staff meetings that took place in May 2002. Tr. I at 44.

Also in December 2001, Dr. Virdee's duties changed once again. Tr. I at 56. Dr. Petzel instructed that she be removed from compensation and pension work, and those duties were

¹⁰ The Blue Primary Care Team consisted of five physicians, two nurse practitioners, two physician assistants, two nurses, and three licensed practical nurses. Tr. II at 236.

reassigned to a nurse. Tr. I at 40, 43, 56, 128-129; Tr. II at 296; Tr. III at 426. Dr. Kenyon testified that this occurred because:

... Doctor Petzel came to the Fargo VA and met with the service officers¹¹ [who] expressed concern about Doctor Virdee's determinations on [compensation and pension] exams, and they were particularly concerned with PTSD [post traumatic stress disorder] exams. When we looked at the total of C&P exams [see CX 13] we didn't find that Doctor Virdee's exams were much outside the line of the national average but the perception by the service officers was that she was anti-PTSD, that was their perception. Since we work in an organization that is heavily involved in and lives under good will of the service organizations, Doctor Petzel determined that it would be best if we did not have Doctor Virdee do PTSD comp and pen exams because even if it wasn't the reality, that was the perception so yes, the order was given that she should be taken out of that role.

Tr. III at 528. At this point, Dr. Virdee contemplated leaving VAMC and requested a recommendation letter from Dr. Johnson. Tr. I at 72. On December 12, 2001, Dr. Johnson wrote a letter praising Dr. Virdee's compensation and pension work and recommending her highly for a position in clinical psychiatry. CX 11. Dr. Virdee ultimately decided not to leave VAMC, however. In lieu of compensation and pension examinations, she was to be given work in primary care. Tr. I at 40-41.

On January 3, 2002, Dr. Johnson assigned Dr. Virdee the task of fulfilling Dr. Talukdar's primary care duties while Dr. Talukdar was on vacation. Dr. Johnson did not discuss with Dr. Talukdar, leader of the Blue Primary Care Team, whether Dr. Virdee would be an appropriate substitute. She was assigned specifically to see his panel of patients, but he only found out about it when he returned. When other doctors were gone, the work was distributed among the remaining doctors in the service. Tr. II at 278. Dr. Talukdar knew of no other instances in which doctors were given work outside the scope of their practice. Tr. II at 302. According to Dr. Virdee, the assignment violated the by-laws of the facility. Tr. II at 300-301. *See also* Dr. Elabasar's testimony, Tr. II at 338-340, that such an assignment would put the patients at risk. That same day, Dr. Virdee composed a memorandum to Dr. Johnson expressing her uneasiness with the assignment because Dr. Talukdar's practice included primary care, while her scope of practice was limited to psychiatry. In the memorandum, she pointed out that she had not practiced as a primary care physician since 1981. She requested assurances that no action would be taken against her license to practice psychiatry in the event she did not perform competently in primary care. CX 8; Tr. I at 60-62. Dr. Virdee testified that Dr. Johnson was so angry with her for objecting to working in primary care that he did not talk to her for a month. Tr. I at 41, 62.

Asked by Dr. Virdee about his impression of working conditions over time as the two of them worked on the H-1B issue, Dr. Talukdar said as the months went by, their supervisors became more hostile. He remembered a specific incident where he, Mr. Redding and Dr. Virdee

¹¹ Representatives of the American Legion, the VFW, the North Dakota Department of Veterans' Affairs, the AMVETS, the Purple Heart and the Disabled American Veterans. Tr. III at 529.

were in a meeting with Dr. Johnson and Mr. Kirk. They were trying to find a way to give Dr. Virdee clinical work and had proposed that she be a consultant psychiatrist to work with primary care teams. Dr. Johnson said he wanted Dr. Virdee out of his hair. Dr. Talukdar could not remember the exact date of that meeting, but believed it took place after his trip to India which occasioned the request for Dr. Virdee to look after his patients. Dr. Talukdar described Dr. Johnson as upset, annoyed and angry. Dr. Talukdar attributed Dr. Johnson's anger at being under pressure from upper level management to have Dr. Virdee removed from her work. Tr. II at 293-295. Dr. Johnson did not testify, but his hostility toward Dr. Virdee is reflected in the proficiency report he completed after she was terminated, described below.

In February 2002, Dr. Virdee was reassigned to work in the psychiatry department under Dr. Kirkman. Dr. Virdee thought the assignment was inappropriate as Dr. Kirkman had assaulted her, and never apologized. Tr. I at 42. Instead, Mr. Redding bargained for her to work full-time in the Union Office to guard Dr. Virdee from what she perceived to be a "dangerous situation." Tr. I at 43, 117.

On March 20, 2002, the District Director of the Wage and Hour Division issued his determination on the H-1B investigation, notifying Mr. Kenyon and Mr. Kirk that he found that VAMC had violated the INA by failing to pay wages as required, assessing back wages to ten H-1B non-immigrants in the amount of \$203,797.54. CX 9. Dr. Virdee posted a notice regarding the violations and communicated the news to the H-1B physicians at VAMC. Tr. I at 29, 101. On April 26, 2002, a local newspaper published an article on the H-1B violations. Tr. I at 44.

In April 2002, Dr. Talukdar resigned as leader of the Blue Primary Care Team after he was finally told that his two step increase would not be forthcoming. Tr. II at 270. He continued to work in primary care, however. Tr. II at 270. Also, in April 2002, Mr. Redding and Mr. Lomsdal, another union representative, met with Dr. Robert Petzel, Network Director, regarding the H-1B issue. At the meeting, Mr. Redding identified Drs. Virdee and Talukdar as persons who had been working the issue. Dr. Petzel indicated that he would look into the issue. Tr. I at 104; Tr. II at 274; Tr. III at 592-593.

Also in April 2002, a problem arose with respect to Dr. Virdee's role in the Pain Resource Team, which had only recently become operational. Tr. I at 43; Tr. III at 404. The Pain Resource Team ("Team") had been coordinated by Dr. Robert Cooper, Dr. Virdee's husband, who is board-certified in physical medicine and rehabilitation, independent medical examinations and pain medicine. Tr. III at 401-402. Meetings had been held at various points throughout the year prior to April 2002 to organize and plan for the establishment of the Team. Tr. III at 404. Dr. Virdee had been present at these meetings and provided input. Tr. III at 404. When the Team ultimately became operational in April 2002, Dr. Virdee saw her first patient; however, she did not have access to a computer which could be used for patient information. Tr. I at 43; Tr. III at 387, 404. When she asked for a computer, it was denied because she was authorized to spend 100% of her time on union business. Tr. III at 387. Although she dictated her notes about the first patient, they never came back to her on the system to sign off on them. Tr. III at 388. Because her computer access was blocked, she could not order appointments. Tr. I at 43-44. On April 5, 2002, Dr. Cooper received an unsolicited memorandum from Dr. Nichols stating that Dr. Virdee would no longer have a clinic scheduled because of her full-time duties as

NFFE vice president. CX 43. Scheduling a clinic is part of the administrative protocol that must be addressed before physicians are able to see patients. Tr. I at 43-44. As a result, Dr. Cooper sent Dr. Nichols a follow-up memorandum attempting to clarify how Dr. Virdee was to continue to see patients as part of the Pain Resource Team if she did not have a clinic scheduled. A series of back-and-forth memoranda ensued between Drs. Cooper and Nichols. Ultimately, Dr. Cooper referred the matter to his supervisor because he felt unable to clarify the situation himself. CX 43; Tr. III at 403-408. Dr. Virdee never received the necessary computer access, and was never able to see any other patients in the pain clinic. Tr. II at 390; *see* CX 22. Mr. Kenyon took the position that all psychiatric referrals should go through Dr. Kirkman. Tr. III at 563-564; CX 19.

At some point during the third week in April 2002, Mr. Kenyon signed an extension of temporary appointment for Dr. Talukdar and his appointment was extended with a new “not to exceed” date of June 30, 2002, on his SF-50. Tr. I at 142. As was customary, according to Mr. Kirk, another temporary appointment acknowledgment form was not obtained from Dr. Talukdar. Tr. I at 145. Mr. Kirk and Mr. Kenyon testified that Dr. Talukdar’s appointment was extended by two months because his special pay was set to expire on June 30, 2002. Had his appointment terminated on the original expiration date of April 28, 2002, Dr. Talukdar would not have worked long enough to receive the full amount of the special pay, and would have to pay part of it back. Therefore, VAMC alleged that it extended the appointment by two months as a courtesy to Dr. Talukdar. Tr. I at 142; Tr. III at 470. At the time of the extension, which had an effective date of April 28, 2002, Dr. Talukdar was earning \$96,345 in basic pay, and \$36,000 in special pay. AX 2.

On May 2, 2002, Dr. Kirkman sent an e-mail requesting that Dr. Virdee fulfill some of her duties during her forthcoming absence. Dr. Virdee responded to Dr. Kirkman’s e-mail, stating that she would be happy to do so, but noting that she would be gone part of the same time that Dr. Kirkman would be gone. Subsequently, Dr. Virdee attempted to make arrangements with Dr. Nichols and Mr. Kenyon via e-mail that would allow her to comply with Dr. Kirkman’s request. Specifically, Dr. Virdee attempted to schedule a clinic such that she would be able to see patients. Mr. Kenyon and Dr. Nichols, however, seemed to take every measure to frustrate Dr. Virdee’s efforts.¹² Finally, on May 10, 2002, Dr. Kirkman sent another e-mail stating that Dr. Virdee’s assistance would no longer be required. CX 19.

Also on May 2, 2002, the first of two medical staff meetings regarding revision of the medical bylaws took place. Tr. I at 44. Drs. Virdee, Talukdar, and Cooper had been assigned the task of handling the revisions. One of the proposed revisions provided that only physicians, and not nurses or physician assistants, be permitted to work on the policies governing the hospital. Tr. I at 46; Tr. II at 303. This revision generated enormous aggravation among those who viewed it as a slight to the nurses and physician assistants, including Dr. Nichols, Dr. Johnson, Dr. Kirkman. Tr. II at 304-307; JX 1.

¹² Testimony of Mr. Kenyon and Mr. Kirk suggests that the decision to terminate Dr. Talukdar had been made by the third week in April. Neither said when the decision was made to terminate Dr. Virdee. I infer from Dr. Kenyon’s testimony that it, too, was made in April. *See* Tr. III at 483-484. Thus although Dr. Virdee, and apparently, Dr. Kirkman, were unaware of it until May 10, it appears that the decision to terminate Dr. Virdee had already been made.

Dr. Talukdar's third proficiency report, which rated his performance from April 29, 2001 to April 29, 2002, contained mainly positive ratings and comments. He received ratings in three categories, with "outstanding" marks in clinical competence and personal qualities, and "high satisfactory" in administrative competence. The overall evaluation was "outstanding." The written comments were substantially similar to the comments in the second proficiency report. The only difference was a final statement at the conclusion of the written comments, indicating that "he may be spreading himself too thin ... in terms of his workload, as he has fallen behind on his paperwork." CX 33.

On May 9, 2002, the second medical staff meeting regarding revision of the medical bylaws took place. Tr. I at 45-6. The second meeting was also extremely heated as those who were angered by the previous meeting, particularly Dr. Johnson, came prepared to state their case. Tr. I at 45; Tr. II at 306, Tr. III at 428-429. Some staff were very angry and confrontational, shouting at the doctors in favor of the amendments. Although Dr. Cooper asked Dr. Nichols, who was chairing the meeting, to address the decorum of the meeting several times, Dr. Nichols never did so. Tr. II at 308; Tr. III at 427-428. Dr. Talukdar had never experienced such a staff meeting at any other hospital and agreed with Dr. Virdee it was very unprofessional. Tr. II at 309. Notwithstanding some serious opposition, a majority of the staff physicians ultimately voted in favor of the revision (12 to 6), one vote short of the number needed to pass the amendments.¹³ Tr. I at 46; Tr. II at 305; Tr. III at 429. On May 10, 2002, Dr. Johnson composed an e-mail expressing his outrage. Dr. Johnson's e-mail generated a thread of e-mails from other staff members, several of whom expressed their agreement with Dr. Johnson. JX 1. Dr. Talukdar was so upset by the e-mails that he never went back to VAMC even to say goodbye. Tr. II at 310.

On approximately May 11, 2002, Dr. Talukdar received a memorandum dated May 1, 2002, subject "Termination of employment," from Mr. Kenyon as Acting Chief Operating Officer, which stated:

1. This is to notify you that your temporary appointment with the Department of Veterans Affairs Medical & Regional Office Center, Fargo, ND will expire on June 30, 2002.
2. Due to the current budget deficit, your appointment will not be extended beyond that date.

CX 40. Dr. Talukdar was taken by surprise by the memo, as no one had told him it was coming, and no one offered him an explanation. Tr. II at 272-273. Dr. Talukdar testified that he talked with Dr. Johnson about it, who said it was because of the budget. He told Dr. Johnson he believed it was related to his work with the H-1B and minority physicians, and advocacy within the union. He said Dr. Johnson responded, "I know you will think that as long as you live, but that [the budget] is the reason I am going to give you." Tr. II at 273.

¹³ Eventually the amendments passed after a secret ballot. Tr. III at 430.

On May 13, 2002, Dr. Virdee received a memorandum dated May 10, 2002, stating that she was terminated. Tr. I at 47. The memorandum, signed by Mr. Kenyon as Acting Chief Operating Officer, stated:

1. This is to notify you that your temporary appointment with the Department of Veterans Affairs Medical & Regional Office Center, Fargo, ND, will be terminated effective close of business on June 6, 2002.¹⁴
2. The reason for termination of your employment is as follows: your services in the Primary Care Patient Service Line are no longer needed.

CX 6.

On June 24, 2002, at Dr. Virdee's request, Tr. I at 66-68, 146, a clarification of the termination memorandum was issued by Tamara Holdcroft, on behalf of the Director/Chief Operating Officer, stating that the decision to terminate Dr. Virdee's temporary appointment "was based on budget matters related to the efficiency of operations of this facility." CX 7. Mr. Kirk testified that the "budget reasons and services required were similar in nature," i.e., "Her services were not required due to budgetary reasons." Tr. I at 147, 163-164.

Mr. Kenyon testified that ultimately, he made the decision to terminate both Dr. Talukdar and Dr. Virdee, in consultation with other individuals, including Dr. Nichols and Dr. Johnson. Tr. III at 468, 477-478. He testified:

... At that time, we were facing a budget deficit of several million dollars, about – it varies between seventy-five and eighty percent of your budget, our salary dollars, so the biggest pot of money is salaries. Usually it's very difficult to just terminate employees, you can't have a RIF, they take a long time, you can't just summarily say, you know, "You're fired", but temporary employees are the – don't have the same amounts of protections and are subject to termination; and we reviewed the workload that we had going at the time, looked to see where there were opportunities to make those difficult decisions, and did.

Tr. III at 468. He said he picked Dr. Talukdar because his appointment was about to run out. He was extended a couple of months to reconcile the problem with his specialty pay. Tr. III at 468-469, 476-477. As to Dr. Virdee, he said:

Again, it was the same sort of situation. We examined the workload and where we thought we could cover, her appointment was also temporary and her workload at that point was very low so that we thought we could cover it and so we made that decision.

Tr. III at 470-471; *see also* Tr. III at 500, 573 (on cross examination by Dr. Virdee, Mr. Kenyon repeated that the reason for firing her was the budget), and Tr. III at 581-583 (on re-cross examination by Dr. Talukdar, Mr. Kenyon reiterated that the reason for not renewing his

¹⁴ June 6, 2002, was the date Dr. Virdee's special pay expired. AX 1.

appointment was the budget). Mr. Kenyon said that Dr. Johnson assumed a good deal of the workload, and some of the work was distributed to other physicians. Tr. III at 471, 477. The persons he consulted also agreed that Dr. Talukdar's workload could be distributed to other people.¹⁵ Tr. III at 501-505. Asked whether any additional physicians or other health care providers were hired to cover the shortfall, he said, "No, the whole point of the exercise was to try and save some money." Tr. III at 471. He said they were several million dollars short, and saved thirty or forty thousand dollars by letting Dr. Talukdar go. Other means of addressing the budget, besides reducing employment, included efforts to enhance collection of payments, to control the amount of work coming in, and to reduce the amount of money in capital accounts, M&R [the abbreviation was not explained], equipment purchases, and for travel. Tr. III at 581-583. Dr. Talukdar's was the only temporary appointment ending at that time. In addition, they made an effort to control medication costs, cut back at the Bismarck outpatient clinic, and cut back on orthopedics. He went on to say, "Anywhere and everywhere that it was possible to save some money, we tried to do that." Tr. III at 583. Although Mr. Kenyon admitted that he knew of both doctors' involvement in the H-1B audit, he claimed that their participation did not influence his decision to terminate them. Tr. III at 472, 485, 489, 499. He was not aware of any physicians other than Drs. Talukdar and Virdee working on H-1B advocacy issues. Tr. III at 493.

Mr. Kirk said he did not know why Dr. Talukdar was selected for non-renewal, Tr. III at 442, and admitted that, while a majority of the primary care physicians at VAMC were temporary appointees who could have been terminated at any time, neither Dr. Virdee nor Dr. Talukdar was among the most junior of the temporary appointees. Tr. III at 446. The reason Mr. Kirk was informed that both Drs. Talukdar and Virdee were terminated was budgetary. Ibid. Mr. Kenyon said that VAMC had a "fairly constant" budget struggle for the last ten years. Tr. III at 473, 492. Both Mr. Kirk and Mr. Kenyon agreed that VAMC had never terminated an employee physician in an effort to balance the budget. Tr. III at 439, 475, 492. In fact, Drs. Talukdar and Virdee were the first staff physicians to be let go for budgetary reasons in all the years that Mr. Kenyon had spent at VAMC. Tr. III at 493. It was a routine thing to convert funds from various parts of the budget, for example, from capital expenses to operating expenses. Tr. II at 475. Although it was done for fiscal year 2002, a balance of a quarter million in funds was returned to the network at the end of the fiscal year. Ibid. Mr. Kirk also testified that since he started work at VAMC in 1995, Dr. Talukdar was the first person in primary care who had not been given a renewal. Tr. I at 153.

¹⁵ Dr. Talukdar attempted to establish that he had the highest work load of any of the primary care doctors given his patient load and administrative duties. See Tr. III at 478-480; CX 39. Dr. Talukdar based his argument on the number of patients seen per hour available. See column headed "Current per hour" at page 2 of CX 39. Mr. Kenyon would not agree, based on the total number of patients in the various doctors' panels. See column headed "Panel Enrollment" at page 1 of CX 39. Whether or not Dr. Talukdar had the heaviest load, the record is clear that he was carrying his weight, as he did have the highest per hour figure, and although the number of patients in his panel had dropped from the prior year, *compare* column headed "Panel Enrollment" at page 1 with column headed "Last FY level" at page 2 of CX 39, it was within the range of the other doctors in primary care.

On July 23, 2002, a final proficiency report, prepared by Dr. Johnson, was added to Dr. Virdee's file. The report, which rated her performance from August 11, 2001 to June 6, 2002, contained two "unsatisfactory" marks, the lowest rating, in clinical competence and personal qualities. All other categories were marked "N/A." The overall evaluation was "unsatisfactory." The written comments stated that Dr. Virdee had refused work assignments on two occasions, when the Blue Primary Care Team needed help with co-managed care paperwork, and when she was assigned back to psychiatry. Finally, the comments stated that Dr. Virdee "did essentially no work for primary care for last 7-8 months of employment." The report concluded, however, that she was "let go for budget reasons." It also stated that she "would definitely not be hired again." Dr. Nichols signed as the approving official. The signature block for Dr. Virdee contained the entry, "Unable to sign--No longer at facility." CX 5. Neither Dr. Nichols nor Dr. Johnson, nor any of the other persons Mr. Kenyon said he consulted about letting the Prosecuting Parties go, were called to testify as witnesses by any party. Although Mr. Kenyon was asked repeatedly about Dr. Virdee's performance, as well as the reason for terminating her employment, he never suggested that he was dissatisfied with her performance, or that anyone else recommended that she be terminated because of her performance, and he specifically stated when asked that he would certainly consider hiring her back. Tr. III at 579.

VAMC advertised for a psychiatrist on five occasions between January and April 2002. CX 44. About May 24, 2002, VAMC submitted an LCA to the Department of Labor seeking authority to hire an H-1B psychiatrist. The period of employment to be covered was from July 1, 2002, to June 30, 2005. CX 14. On September 16, 2002, before the end of fiscal year 2002, Dr. Dalall, a psychiatrist, was hired. Tr. III at 448. While Drs. Dalall and Virdee are both psychiatrists, Mr. Kirk made the distinction that Dr. Virdee had been providing psychiatric services in primary care, rather than psychiatry. Tr. I at 149.

One primary care physician was hired by VAMC to work at the out-patient clinic in Grand Forks between March 1 and August 1, 2002. Tr. I at 147; Tr. II at 197, 199, 200. VAMC did not hire any other new primary care physicians for the rest of the fiscal year. Tr. I at 147; Tr. III at 462. That notwithstanding, VAMC did place five advertisements for a staff internist in August 2002. CX 44; Tr. III at 450-451. In addition, Mr. Kirk admitted that VAMC would not have been advertising for an internist if there were no position or funding available for an internist's salary. Tr. III at 454-456.

In addition to the advertisements for a psychiatrist and internal medicine, in fiscal year 2002, VAMC also advertised for a urologist, cardiologist, gastroenterologist, chief of surgery and primary care. CX 44. Dr. Talukdar also introduced into evidence a VAMC vacancy announcement for the position of Interior Designer open for applications from September 6-26, 2002. According to an SF-50 introduced along with the vacancy announcement, the position was filled at a salary of \$45,285 effective September 30, 2002. CX 45. Mr. Kenyon testified that he did not hire the interior decorator; by the end of the fiscal year, someone else was acting in the position of Center Director. He had returned to the position by the time he testified. Tr. III at 586, 588.

II. DISCUSSION

A. Protected Activity

Drs. Talukdar and Virdee established that they engaged in protected activity by speaking to VAMC management officials about H-1B pay issues and participating in the Wage and Hour Division's H-1B audit of VAMC. As union representatives for the physicians in Local 225 of NFFE, Drs. Talukdar and Virdee worked extensively with Mr. Redding on the H-1B issue. Counsel for VAMC stipulated that both Dr. Talukdar and Dr. Virdee advocated on behalf of the H-1B visa holders as part of the Department of Labor's audit. Tr. II at 244-246. Mr. Redding testified that he identified Drs. Talukdar and Virdee as participants to Dr. Petzel. Tr. I at 104. Mr. Redding, Dr. Talukdar and Dr. Virdee participated in a telephone conference on the subject with Janet Murphy, the "CEO of the Primary Care Service Line" in Minneapolis, about six months before the doctors were let go. Tr. II at 275. Mr. Kirk testified that he was aware that they had worked with the Department of Labor once the Wage and Hour investigator started to investigate the complaint. Tr. I at 160. Mr. Kenyon testified that he knew Dr. Virdee had worked on the issue since she became a member of the union. Tr. III at 498. Additionally, Prosecuting Parties established instances in which they disclosed information to VAMC regarding the violations. In approximately September 2001, Dr. Talukdar spoke to Dr. Johnson several times about the H-1B issue. Tr. II at 253-54. Dr. Virdee also asked Dr. Johnson about why pay scales were different for the doctors. Tr. I at 73. In October 2001, Dr. Talukdar had a conversation with Dr. Nichols during which Dr. Talukdar voiced his concerns about the H-1B issue. Tr. II at 254. In April 2002, Dr. Virdee posted the H-1B violations at VAMC and communicated the news to H-1B physicians. Tr. I at 101.

B. Adverse Action

VAMC took adverse action against Dr. Talukdar when it decided not to renew his appointment. CX 40. VAMC took adverse action against Dr. Virdee when it decided to terminate her appointment early. CX 6.

C. Nexus Between the Protected Activity and Adverse Action

Although Drs. Talukdar and Virdee worked on the H-1B issue with Mr. Redding over an extended period of time, the sequence of events representing the crux of this case transpired over a period of less than two months. "Proximity in time is sufficient to raise an inference of causation." *Bechtel Construction Co. v. Sec'y of Labor*, 50 F.3d 926, 934 (11th Cir. 1995), citing *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989).

On March 20, 2002, the H-1B issue truly came to the forefront at the VAMC when DOL sent a letter to Mr. Kenyon and Mr. Kirk explaining that VAMC owed over \$200,000 in back wages to ten H-1B physicians. In April 2002, Dr. Talukdar was told that a two step increase in his pay, which had been proposed initially in September 2001, would not be forthcoming. Tr. II at 270. Also during the month of April 2002, a meeting among union representatives and VAMC authorities was held to discuss the H-1B issue. Tr. II at 274. At some point during the third week in April 2002, having decided to terminate Dr. Talukdar and Dr. Virdee, Mr. Kenyon

signed a two-month extension of appointment for Dr. Talukdar to coincide with the anniversary of his special pay. Shortly thereafter, on April 26, 2002, a local newspaper published an article regarding the H-1B violations. Tr. I at 142; Tr. I at 44. The memorandum to Dr. Talukdar stating that his temporary appointment with VAMC was to expire on June 30, 2002 was issued and delivered during the next two weeks. CX 40. Although he claimed that Dr. Talukdar's participation in the H-1B audit did not influence his decision not to renew Dr. Talukdar, Mr. Kenyon admitted having known of Dr. Talukdar's involvement in the audit. Tr. III at 472. Dr. Talukdar had been given no advance warning regarding his non-renewal. Tr. II at 273. Similarly, Mr. Kenyon's memorandum to Dr. Virdee stating that her temporary appointment with VAMC was to terminate at close of business on June 6, 2002, was issued without advance warning on May 10, 2002. Although he claimed that Dr. Virdee's participation in the H-1B audit did not influence his decision to terminate her, Mr. Kenyon admitted having known of Dr. Virdee's involvement in the audit. Tr. III at 472.

D. Respondent's Legitimate, Non-Discriminatory Reason

VAMC has articulated "budget matters" as the legitimate, non-discriminatory reason for non-renewal of Dr. Talukdar and termination of Dr. Virdee. CX 40; CX 7. Mr. Kenyon said that Dr. Talukdar was selected for non-renewal because his appointment was due to expire. Tr. III at 469. He testified Dr. Virdee was chosen for termination because it was believed that her workload was very low and could be covered by other physicians. Tr. III at 470-71.

E. Pretext

Both the underlying reason of budget matters, and the particular explanations for selecting Drs. Talukdar and Virdee for termination, lack credibility.

Several admissions made by Mr. Kenyon indicate that VAMC's proffered budget reasons are pretextual. He admitted that in April 1999, the month during which Dr. Talukdar was hired, there was a budget deficit at VAMC. Tr. III at 474. Despite the deficit at that time, VAMC allocated funds not only to hire Dr. Talukdar but also to afford him specialty pay as a primary care specialist. Tr. III at 469. Mr. Kenyon also testified that in the past five years, from 1997-2002, there had never been a budget surplus at VAMC. Tr. III at 476. Therefore, when Dr. Virdee was hired, in August 1997, there was at least a budget "struggle," if not a budget deficit, at VAMC. Nonetheless, VAMC managed to apportion sufficient funds to hire Dr. Virdee at that time.

Mr. Kenyon also admitted that it was routine for VAMC to convert funds in various parts of the budget as needed, such as from capital expenses to operating expenses. Tr. III at 475. Such a conversion was in fact executed for fiscal year 2002. Tr. III at 475. In addition, he indicated that the Network often furnished VAMC with funds to balance its budget. Tr. III at 476. Depending on the circumstances, the funds would, at times, be returned to the Network. Tr. III at 476. In fiscal year 2002, approximately one quarter of a million dollars of borrowed funds were returned to the Network. Tr. III at 476. Thus Mr. Kenyon testified that, while there appeared to be a balance at the conclusion of VAMC's fiscal year 2002, the Network ultimately reclaimed that balance. Tr. III at 475. However, that testimony did not establish that the funds

could not have been used to pay the salaries of Drs. Talukdar and Virdee. Indeed, VAMC sought to hire another internist within two months of Dr. Talukdar's leaving, before the end of the fiscal year. Mr. Kirk admitted that VAMC would not have been advertising for an internist if there were no vacancy or money available for an internist's salary. Tr. III at 456. Moreover, on September 16, 2002, before the end of fiscal year, VAMC hired Dr. Dallal, a psychiatrist, for the Mental Health Department. Tr. III at 448. VAMC justified its hiring of Dr. Dallal so shortly after terminating Dr. Virdee, also a psychiatrist, by making the distinction between Primary Care, the department in which Dr. Virdee worked, and Mental Health, the department for which Dr. Dallal was hired. Tr. I at 149. The evidence, however, supports the conclusions that VAMC could have funded both Dr. Talukdar's and Dr. Virdee's positions as well as Dr. Dallal's, and had considerable latitude in how it assigned physicians to departments.

Finally, Mr. Kenyon admitted that VAMC had "never fired a physician for trying to balance the budget." Tr. III at 476. He further admitted that between 1992 and 2002, VAMC had terminated contract physicians, but never employee physicians, for budgetary reasons. Tr. III at 475. Drs. Talukdar and Virdee were not considered contract physicians. Tr. III at 475. Mr. Kenyon also admitted that Drs. Talukdar and Virdee were the first temporary employee physicians to be "let go" in the ten years that he had served as Center Director at VAMC. Tr. III at 492.

Nor do the explanations offered for selecting Dr. Talukdar and Dr. Virdee for termination stand up to close scrutiny. Mr. Kenyon said that Dr. Talukdar was chosen because his temporary appointment was ending, and his patients could be covered by other doctors. By their terms, temporary appointments could be terminated at any time. Thus the fact that Dr. Talukdar's appointment was ending had no particular significance. Moreover, Dr. Talukdar carried a substantial patient load. By mid-August 2002, VAMC began advertising for a primary care physician.

As to Dr. Virdee, whose appointment would not expire until August 2003, Mr. Kenyon said only that her appointment was temporary and her work load was very low, so they thought they could cover it. In fact, Dr. Virdee had no work to be distributed to other physicians, as she was spending 100% of her time on union activities. Moreover, several witnesses gave uncontradicted testimony that they attempted to arrange for her to see patients, for example, in the pain clinic, but all of their efforts were blocked. Mr. Kenyon's testimony that Dr. Virdee's work could be covered by others makes no sense in the context of these facts.

Although counsel for VAMC suggested in his opening and closing statements on the first day of hearing that concern with Dr. Virdee's performance was a factor in her termination, Tr. I at 16, 180-181, neither of VAMC's witnesses so testified. Mr. Kirk said he was told that she was let go for budgetary reasons, and that was his understanding of the reason. Despite repeated questioning about Dr. Virdee's performance, and the evidence in the record that by the time of her termination, Dr. Virdee had had conflicts with Dr. Kirkman, Dr. Johnson, and Dr. Nichols about matters other than the H-1B physicians, Mr. Kenyon never said that he, or anyone he consulted, took Dr. Virdee's performance or those conflicts into account in the decision to terminate her. Dr. Johnson's negative post-termination performance rating does not by itself

constitute evidence that Dr. Virdee was selected for termination because of poor performance. Moreover, the July 23, 2002 proficiency report appears baseless for several reasons.

First, the report is wholly inconsistent with the four other proficiency reports that Dr. Virdee received while at VAMC. Moreover, the report at issue was not added to her file until over a month after her appointment had been terminated. Finally, the record supports the conclusion that the report was inaccurate and vindictive in several respects.

The report rates Dr. Virdee as “unsatisfactory” in clinical competence. Her only duties relating to clinical competence during the rating period had to do with compensation and pension evaluations. The “unsatisfactory” rating is inconsistent with Dr. Johnson’s letter of recommendation, CX 13, written in December 2001, contemporaneously with the end of Dr. Virdee’s stint in compensation and pension work. According to Mr. Kenyon’s testimony, those duties were removed from Dr. Virdee for political reasons having nothing to do with the quality of her work.

The report also states that Dr. Virdee refused to assist the Blue Primary Care Team with co-managed care paperwork. This is a distortion of fact as it appears from the record before me. The record shows that Dr. Virdee was asked by Dr. Johnson to fulfill all of Dr. Talukdar’s primary care duties while he was on vacation, not mere paperwork. The record also shows that Dr. Virdee’s refusal to accept the assignment was well-founded because it was outside the scope of her practice, and would have compromised patient care.

The negative proficiency report was not explained by any witness. I therefore draw the inference that it was given, at least in part, because of Dr. Virdee’s advocacy for the H-1B physicians. I further find that it should be expunged from her record as part of the relief to Dr. Virdee.

What Dr. Talukdar and Dr. Virdee had in common was their activities, through the union, on behalf of the H-1B doctors. As far as the evidence before me reveals, they were the only non-H-1B staff physicians who engaged in such activities. They disclosed information to VAMC management officials that the H-1B doctors were improperly paid, and they cooperated with the Wage and Hour Division’s investigation. Their conduct was protected by the whistleblower provision of the INA in both respects. They have shown a causal nexus between their protected activity and their terminations, which occurred within two months of the Wage and Hour Division’s determination that VAMC had violated the INA. The reasons proffered for their terminations are not the true reasons. Thus the evidence supports the conclusion that their activities on behalf of the H-1B doctors was the reason they were let go, also a violation of the INA.

III. RELIEF

Violations of the employee protection provision of the INA are subject to appropriate administrative remedies, including reinstatement, back wages and other appropriate legal or equitable remedies. 20 CFR §810(e). Dr. Talukdar seeks the following relief: 1) back pay to compensate him for lost earnings; 2) reimbursement for lost employee benefits, including family

health insurance and the Federal Thrift Savings Plan; 3) reimbursement for relocation expenses; 4) reinstatement at either VAMC or another VA facility of his choosing; 5) civil penalties for violating 20 CFR § 655.801(a). Tr. II at 279-81. Dr. Virdee seeks the following relief: 1) back pay to compensate her for lost earnings; 2) an order requiring VAMC to purge her file of the July 23, 2002 proficiency report; 3) reinstatement at a different VA facility of her choosing. Tr. I at 74-77.

A. Reinstatement

Both Prosecuting Parties are entitled to reinstatement. Both have expressed reservations about returning to work at VAMC in Fargo. However, counsel for VAMC represented that VAMC does not have the authority to transfer employees to other facilities. See Transcript of the January 14, 2003, telephone conference at 13. The record indicates that some of the Prosecuting Parties' concerns can be met due to changed circumstances, and the fact that the Fargo VAMC employs physicians at outpatient facilities in other cities. Moreover, both parties are at liberty to accept or reject the offer of reinstatement, with the caveat that if they decide to reject it, their back pay would terminate as of the date they reject the offer.

As for Dr. Virdee, the most appropriate placement may be at Fargo, as her husband also works there. Although the record discloses that both Dr. Kirkman and Dr. Johnson have demonstrated animus against her, Dr. Kirkman has left for other employment and is therefore no longer the head of the mental health service. Tr. III at 578. The record also suggests that Fargo has a chronic need for psychiatrists in the mental health service. Dr. Kenyon characterized Dr. Virdee as "qualified eminently as a psychiatrist," Tr. III at 547, and testified without hesitation that he would consider hiring her back, Tr. III at 579. I conclude that VAMC should offer Dr. Virdee employment at Fargo as a psychiatrist in the mental health service, with the same salary and benefits as if she had no gap in service. In the alternative, if the parties agree on an alternate location, she may be placed at another facility operated by VAMC.

Dr. Talukdar has moved his family to Texas, and has put substantial time and effort into a fellowship in a new specialty. Nonetheless, like Dr. Virdee, he is entitled to an offer of employment in an equivalent position in primary care as he occupied before, at Fargo or another mutually agreeable facility operated by VAMC, with the same salary and benefits as if he had no gap in service.

B. Back Pay, Benefits and Interest

The purpose of a back pay award is to make the employee whole, that is, to restore the employee to the same position he or she would have been in if not discriminated against. Back pay awards should, therefore, be based on the earnings the employee would have received but for the discrimination. See *Blackburn v. Metric Constructors, Inc.*, 86-ERA-4 (Sec'y Oct. 30, 1991). A complainant has the burden of establishing the amount of back pay that a respondent owes. See *Pillow v. Bechtel Construction, Inc.*, 87-ERA-35 (Sec'y July 19, 1993). Because back pay promotes the remedial statutory purpose of making whole the victims of discrimination, "unrealistic exactitude is not required" in calculating back pay. *EEOC v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 587 (2d Cir. 1976) (quoting *Hairston v. McLean*

Trucking Co., 520 F.2d 226, 233 (4th Cir. 1975)). Uncertainties in establishing the amount of back pay to be awarded are to be resolved against the discriminating party, however. *McCafferty v. Centerior Energy*, 96-ERA-6 (ARB Sept. 24, 1997). Interim earnings at a replacement job are deducted from back pay awards. *Williams v. TIW Fabrication & Machining, Inc.*, 88-SWD-3 (Sec'y June 24, 1992). Although it is well settled that back wage calculations should include fringe benefits, courts disagree about the proper method of calculating the value of lost insurance coverage. See, e.g., *Aledo-Garcia v. Puerto Rico Nat'l Guard Fund, Inc.*, 887 F.2d 354, 356 (1st Cir. 1989)(holding that cost to employer is reasonable method for calculation of value of health insurance benefits as amount of wages that could have been earned includes value of any fringe benefits, such as medical insurance, that are generally provided by employer); *Kossman v. Calumet County*, 800 F.2d 697, 703-04 (7th Cir. 1986)(holding employer must reimburse the cost of alternate insurance actually purchased); *Weiss v. Parker Hannifan Corp.*, 747 F. Supp. 1118, 1132 (D. N.J. 1990) (awarding actual unreimbursed medical expenses). In this case, as there is no evidence regarding the cost of alternate insurance or unreimbursed medical expenses, I find that both parties should receive as part of their back pay the same benefits as they were receiving at the time they left their employment with VAMC, i.e., whichever benefits programs they were participating in (e.g., health insurance, life insurance, retirement plan, thrift plan). In order to achieve this, the back pay calculation should include the employer contributions which would have been made had their employment been uninterrupted. If they accept reinstatement, they should also be given the option to deposit, along with the employer contributions, any required employee contributions to the retirement and thrift plans for the period they were not in the employment of VAMC. Finally, in order to make them whole, they are entitled to interest on their back pay awards.

As of April 2002, Dr. Talukdar was earning basic pay of \$96,345 and special pay of \$38,000, for a total of \$134,345 per year. AX 2. The most recent SF 50 in the record for Dr. Virdee indicates that in August 2000, she was earning basic pay of \$95,723, and special pay of \$59,500, for a total of \$155,223. AX 1. Dr. Virdee testified that at the time she was terminated, she was making approximately \$168,500 per year. Tr. I at 75. According to the web-site maintained by the U.S. Office of Personnel Management at <http://www.opm.gov>, of which I take official notice pursuant to 29 CFR § 18.45, Department of Veterans' Affairs employees received an increase of 2.7% in calendar year 2001, 3.6% in calendar year 2002, 3.1% in calendar year 2003, and 2.7% in calendar year 2004. Application of the percentage increases for 2001 and 2002 to Dr. Virdee's August 2000 salary yields a 2002 salary of \$165,163. I conclude that application of the percentage increases specified by OPM yields a sufficiently accurate projection of their prospective salaries to calculate their back pay. Since interim earnings at a replacement job are deducted from back pay awards, it is also necessary to assess Dr. Talukdar's and Dr. Virdee's earnings after leaving VAMC.

Immediately after his appointment at VAMC expired on June 30, 2002, Dr. Talukdar began performing emergency staff work, consisting of intermittent night and weekend shifts. Tr. II at 279. He earned approximately half of what he earned at VAMC and received no benefits at these positions. Tr. II at 279-280. He thereafter assumed a *locum tenens* position (i.e. a contract position) in New Zealand for six weeks, where he earned approximately forty percent of what he earned at VAMC. Tr. II at 280. He received neither benefits nor transportation costs. Tr. II at 280. Subsequently, Dr. Talukdar relocated to Texas with his family where he began a fellowship

in October 2002. Tr. II at 281. The fellowship provides approximately \$48,000 a year with benefits. Tr. II at 281. Based on a calendar year salary of \$134,345 at VAMC for 2002, his back wages may be calculated by subtracting these earnings from projected earnings from VAMC of \$67,173 for the remainder of 2002 after June 30, an annual salary of \$138,500 in 2003, and an annual salary of \$142,240 in 2004. Benefits calculations should be based on the full VAMC salary, without deductions for alternate earnings.

After she was terminated from VAMC, Dr. Virdee attempted to start her own practice in Fargo. Tr. I at 75. Thus far, she has not made any income from her private practice. Tr. I at 75. Rather, she is approximately \$25,000 - \$30,000 in debt. Tr. at 75. I find that Dr. Virdee's attempt to start her own practice was a reasonable means of mitigating her damages. As she had no earnings, however, nothing should be deducted from her back pay. Based on a calendar year salary of \$165,153 at VAMC for 2002, Dr. Virdee's back pay may be calculated by projecting earnings from VAMC of \$96,340 for the remainder of 2002 after June 6, an annual salary of \$171,273 for 2003, and an annual salary of \$176,265 in 2004.

C. Relocation Expenses for Dr. Talukdar

Dr. Talukdar incurred expenses in the amount of \$4,500 to relocate from North Dakota to Texas. Tr. II at 281. Although Dr. Talukdar had been seeking a fellowship while employed at VAMC, the fellowship he ultimately obtained in Texas was not in his chosen field. Tr. II at 281. He nevertheless accepted the fellowship because he "needed to get a position where [he] could move on." Tr. II at 281. I find that he should be reimbursed for those expenses, and, if he accepts re-employment by VAMC, VAMC should also bear his moving expenses to return from Texas.

D. Purging the Proficiency Report from Dr. Virdee's Personnel File

20 CFR § 655.810(e)(2) provides that I have the discretion to assess "other appropriate legal or equitable remedies" against employers that have violated 20 CFR § 655.801(a). Because I have concluded that the July 23, 2002, proficiency report was motivated in part by her advocacy for the H-1B physicians, it should be expunged from Dr. Virdee's records.

E. Civil Penalties

Although the INA authorizes the imposition of civil penalties and debarment from participation in the H-1B program for violations of the LCA provisions, I conclude that these remedies are inappropriate against this Respondent, a publicly funded veterans' medical center with chronic budget struggles, which needs H-1B physicians to provide care for its patients.

ORDER

IT IS THEREFORE ORDERED:

1. VAMC shall offer reinstatement to Dr. Talukdar in primary care at Fargo or another mutually agreeable facility operated by VAMC, with the same salary and benefits as if he had no

gap in service. If Dr. Talukdar accepts the offer of reinstatement, VAMC shall pay his moving expenses, and he shall be credited with continuous federal service for all purposes, including retirement if he makes the required employer and employee contributions for the period he was unemployed. If Dr. Talukdar declines the offer of reinstatement, the obligation of VAMC to pay back wages shall end as of the date of such rejection.

2. VAMC shall pay back wages and benefits to Dr. Talukdar in accordance with my findings above for the period from June 30, 2002, until he resumes employment with VAMC or declines the offer of reinstatement. If he resumes employment, Dr. Talukdar shall be given the option of making employer and employee contributions to his retirement and thrift savings plan accounts for the period covered by back wage payments.

3. VAMC shall reimburse Dr. Talukdar for moving expenses in the amount of \$4500.00. If he accepts reinstatement, VAMC shall pay his moving expenses to return.

4. VAMC shall offer reinstatement to Dr. Virdee as a psychiatrist in the mental health department at Fargo or another mutually agreeable facility operated by VAMC, with the same salary and benefits as if she had no gap in service. If Dr. Virdee accepts the offer of reinstatement, she shall be credited with continuous federal service for all purposes, including retirement if she makes the required employer and employee contributions for the period she was unemployed. If Dr. Virdee declines the offer of reinstatement, the obligation of VAMC to pay back wages shall end as of the date of such rejection.

5. VAMC shall pay back wages and benefits to Dr. Virdee in accordance with my findings above for the period from June 6, 2002, until she resumes employment or declines the offer of reinstatement. If she resumes employment, Dr. Virdee shall be given the option of making employer and employee contributions to her retirement and thrift savings plan accounts for the period covered by back wage payments.

6. Prosecuting Parties are entitled to interest on accrued unpaid wages, benefits and moving expenses. The applicable rate of interest shall be calculated in accordance with 28 U.S.C. §1961.

7. The Administrator of the Wage and Hour Division shall make all calculations necessary to carry out this order.

8. VAMC shall purge the July 23, 2002, proficiency report from all of Dr. Virdee's personnel files, wherever maintained.

A

ALICE M. CRAFT
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 CFR § 655.845, any party dissatisfied with this Decision and Order may appeal it to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210, by filing a petition to review the Decision and Order. The petition for review must be received by the Administrative Review Board within 30 calendar days of the date of the Decision and Order. Copies of the petition shall be served on all parties and on the administrative law judge.